

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY GALLARZO,

Defendant and Appellant.

B217875

(Los Angeles County
Super. Ct. No. BA347577)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald H. Rose, Judge. Affirmed as modified.

Maria Morrison, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and E. Carlos Dominguez, for Plaintiff and Respondent.

Gregory Gallarzo was convicted of robbery, assault with a handgun, and other related counts, including a felon in possession of a firearm and in possession of ammunition. He contends the trial court erred by imposing a consecutive sentence for the ammunition possession charge because it was incidental to his unlawful firearm possession. We reject that contention. However, because the abstract of judgment incorrectly states that Gallarzo was convicted of assault with a semi-automatic firearm, we modify the judgment to state correctly that he was convicted of assault with a firearm. As modified, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 17, 2008, brothers Tomas and Juan Carlos Barrales were at the Big Burrito restaurant in their Boyle Heights neighborhood when defendant Gallarzo came in, pulled out two handguns, and demanded money from them.¹ Gallarzo spoke in English, which the brothers did not understand well. When Tomas asked a restaurant employee to translate what Gallarzo was saying, Gallarzo hit Tomas on the side of the head with a handgun. After each brother gave Gallarzo three dollars, he fled the restaurant. The restaurant owner called the police, who arrived and interviewed the brothers. The brothers recognized Gallarzo as someone from their neighborhood, and identified him in a photo line-up. The police could not find Gallarzo, and he remained at large.

On November 13, 2008, Los Angeles police officers received a tip that Gallarzo was living on Stone Avenue, not far from the Big Burrito. The record is unclear, but it appears the police found and arrested Gallarzo in the backyard of a house located on Wabash Avenue adjacent to the Stone Avenue house. The police searched the backyard of the Wabash Avenue residence and found a bulletproof vest and a fully loaded .40 caliber Smith & Wesson handgun 15 to 20 feet from where Gallarzo was arrested. A bag containing 11 rounds of matching .40 caliber Smith & Wesson ammunition was found in

¹ For ease of reference, we will refer to the brothers individually by their first names, and collectively as the brothers.

an adjacent alley, about 18 to 22 feet away from where the gun and vest were discovered.²

Gallarzo was charged with: two counts of second-degree robbery (Pen. Code, § 212.5, subd. (c)); one count of assault with a semi-automatic firearm (Pen. Code, § 245, subd. (b)); two counts of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)); and one count of possession of ammunition by a person prohibited from possessing a firearm (§ 12316, subd. (b)(1)).³ A jury found him guilty of all charges except the allegation that the assault was committed with a semi-automatic weapon. Because the jury did not find the weapon to be a semi-automatic, the court deemed the conviction as assault with a firearm under section 245, subdivision (a)(2).

The trial court sentenced Gallarzo to a total state prison sentence of 19 years and 4 months. Relevant here is his eight-month sentence for being a felon in possession of a firearm and his consecutive eight-month sentence for the unlawful possession of ammunition. Gallarzo contends the eight-month sentence for ammunition possession should have been stayed pursuant to section 654 because the offense was incidental to his objective of being a felon in possession of a firearm. Gallarzo also contends that the abstract of judgment should be modified because it incorrectly states he was convicted of assault with a semi-automatic firearm, when he was actually convicted of assault with a firearm.

² Gallarzo does not contest possession of these items.

³ Felons, because they are prohibited from possessing firearms under Penal Code section 12021, subdivision (a)(1), are likewise prohibited from possessing ammunition. (Pen. Code, § 12316, subd. (b)(1).) For ease of reference, we will refer to the latter charge as unlawful ammunition possession.

All further section references are to the Penal Code.

DISCUSSION

1. *The Trial Court Properly Refused to Stay Gallarzo's Sentence for Unlawful Possession of Ammunition Under Penal Code Section 654*

Gallarzo filed a sentencing memorandum that asked the trial court to stay his sentence on several counts under section 654, but did not ask the court to stay sentence for the unlawful ammunition possession count. Instead, he asked for “subordinate terms” on the felon-firearm and unlawful ammunition possession counts. The prosecutor’s sentencing memorandum asked for a consecutive sentence on the unlawful ammunition possession count, but did not articulate a reason for doing so. The trial court imposed a consecutive sentence on the unlawful ammunition possession count, but stated no reasons for doing so. Gallarzo contends that consecutive sentence should have been stayed pursuant to section 654.

Section 654 provides that, “An act or omission that is punishable in different ways by different provisions of law be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one[.]” Thus, when a single act is charged as the basis for a conviction, the defendant can be punished only once. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208.) Although section 654 prohibits multiple punishments for crimes arising from a single act or indivisible course of conduct (*People v. Britt* (2004) 32 Cal.4th 944, 951-952), multiple punishments are permitted when independent criminal objectives were entertained. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

A trial court’s implied findings that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) Where a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he may be punished for more than one crime even though the violations share common acts or are parts of an otherwise indivisible course of conduct. (*Ibid.*) Relying on *People v. Lopez* (2004) 119 Cal.App.4th 132 (*Lopez*), Gallarzo contends that he had

only one objective—to possess a loaded firearm—and that the additional ammunition was merely incidental to this objective.

In *Lopez*, police officers were called to a park after the defendant had been seen with a handgun. The defendant became combative when approached by the officers, and reached toward the front of his pants several times. After the officers subdued the defendant, they found a loaded handgun in his pants pocket. The defendant was sentenced to six years in state prison for unlawful possession of a firearm, along with a concurrent six-year term for unlawful possession of ammunition. All the ammunition in the defendant’s possession had been loaded into the gun. Based on that circumstance, the *Lopez* court held that the sentence for unlawful possession of ammunition should have been stayed because the defendant had only one intent: to possess a loaded firearm. (*Lopez, supra*, 119 Cal.App.4th at p. 138.)

In reaching this conclusion, the *Lopez* court turned to the legislative objectives behind the laws that barred felons from possessing guns or ammunition. “While possession of an unloaded firearm alone can aid a person committing another crime, possession of ammunition alone will not. The former may be used as a club and a victim may be fearful that the firearm is loaded. While the latter may be thrown at a victim, it is extremely unlikely that possession of bullets alone would scare anyone but the most timid. In combination, however, the mixture is lethal and that is why criminals have a penchant for loaded firearms. [¶] The Legislature has wisely declared that specified people should not possess firearms and/or ammunition. The obvious legislative intent is to prohibit these persons from combining firearms with ammunition. Appellant’s obvious intent was to possess a loaded firearm.” (*Lopez, supra*, 119 Cal.App.4th at p. 138.)

While allowing multiple punishment for unlawful possession of ammunition that was loaded into a firearm would “parse the objective too finely,” the *Lopez* court said “*there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, . . . [but when] all of the ammunition is loaded into the firearm, an*

‘indivisible course of conduct’ is present and section 654 precludes multiple punishment.” (*Lopez, supra*, 119 Cal.App.4th at p. 138, italics added.)

Based on this italicized language, we do not believe *Lopez* helps Gallarzo. Instead, we conclude that this case falls within the range of possible exceptions identified in *Lopez*. Unlike the *Lopez* defendant, Gallarzo did not have all of his ammunition loaded into his gun. Gallarzo had an extra, geographically remote stash of ammunition that could have been used at a different time. Unlike the *Lopez* defendant who had a single intent to carry a loaded firearm, the trial court reasonably could have found that Gallarzo’s possession of additional, unloaded ammunition reflected a separate intent: to possess more ammunition that he could use to reload his firearm in the future. This finding supported the trial court’s refusal to apply section 654 and its decision to impose a consecutive sentence.

2. *The Abstract of Judgment Should be Modified to Show that Gallarzo Was Convicted of Assault with a Handgun*

Gallarzo was charged for assault with a semi-automatic gun; the jury, however, was unable to reach a verdict on the count. As a result, and without objection from the People or the defense, the trial court deemed Gallarzo convicted of the lesser included offense of assault with a handgun that was not semi-automatic. (§ 245, subd. (a)(2).) Although the abstract of judgment correctly identifies that code section, it mistakenly describes the offense as “assault wit [sic] semiautomatic.” Respondent concedes this was error. We agree, and will order that the abstract of judgment be modified to correct the error.

DISPOSITION

The abstract of judgment is modified to delete the phrase “assault wit semiautomatic” that describes Gallarzo’s conviction under Penal Code section 245, subdivision (a)(2), and replace it with the phrase “assault with firearm.” The trial court is directed to modify the abstract of judgment to reflect this change and send a corrected

copy of the abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.